(3)

No. 91-1200

IN THE SUPREME COURT
OF THE UNITED STATES

CITY OF CINCINNATI,

Petitioner,

-against-

DISCOVERY NETWORK, INC. and HARMON PUBLISHING CO.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH
CIRCUIT

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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INTEREST OF AMICUS CURIAE

In April 1988 the Commissioner of the New York City Department of Transportation promulgated a rule that prohibits the placement, installation or maintenance on the streets of any structure used for the purpose of distributing commercial speech. 11 Rules of the City of New York, Title 34, §2-08. The rule defines

the term commercial speech to mean written material that proposes a commercial transaction, refers to specific products or services and which is published for the purpose of promoting those products or services. If these criteria are present, the material constitutes commercial speech, notwithstanding the fact that the material may contain a discussion of public issues. §2-08, subd. a.

The efforts of the City of New York to prohibit on its streets the placement of structures used to distribute commercial speech began in 1985, when such structures first began to proliferate. At that time the City commenced judicial proceedings against The Learning Annex, Inc., a for-profit corporation offering short-term, non-accredited courses similar to those offered by respondent Discovery Network. The Learning Annex, Inc. had placed on the

streets of the City hundreds of boxes containing catalogues promoting its courses. In 1987 the New York Court of Appeals invalidated our effort on the ground that the City had failed to promulgate a rule establishing guidelines to guard against arbitrary action by City officials. City of New York v. American School Publications, Inc., 69 N.Y.2d 576, 509 N.E. 2d 311. In so doing, however, the Court of Appeals noted that the City has police power interests in the protection of the "smooth flow of pedestrian movement on its streets" and the maintenance of the "relative cleanliness of its streets." Id. at 582. The Court concluded that if the City adopted a proper rule, it could, consistent with the First Amendment, distinguish between commercial speech and noncommercial speech. It observed:

> The City may ultimately choose to distinguish between

> commercial and noncommercial speech if it does regulate the installation of sidewalk bins, and its choice would not in and of itself offend the 'content neutrality' requirement [of the First Amendment] (citations omitted.). Id. at 583; 509 N.E. 2d 314.

Section 2-08 of the rules of the New York City Department of Transportation represents the City's effort to comply with the opinion of the New York Court of Appeals in City of New York v. American School Publications. In the five years since that case was decided, hundreds of additional boxes dispensing commercial advertising have been placed on our streets by a variety of commercial interests. These boxes, the vast majority of which are located in the congested business districts of Manhattan, are frequently placed in or immediately adjacent to crowded cross-walks, bus stops and subway entrances. The boxes are often poorly maintained and filled with

refuse and other debris, and have become an impediment to pedestrian movement and a considerable eyesore.

In December 1989 the City of New York commenced a number of actions in the Supreme Court of the State of New York to enforce §2-08 of the Department of Transportation rules. Among the entities named as defendants were The Learning Annex, and Harmon Publishing Company, who is a respondent in the instant case. In a decision dated May 6, 1991, New York State Supreme Court Justice Alice Schlesinger declared §2-08 unconstitutional. City of New York v. The Learning Annex Inc., (Sup. Ct. N.Y. Co., Index No. 46727/89), (n.o.r.). The Court found that the City had failed to demonstrate that its interests in safety and esthetics could not be achieved by a "regulating scheme which rationally limits the number and location of

these receptacles rather than totally bans them." An appeal from this judgment is currently pending in the Appellate Division, First Department of the New York State Supreme Court.

The interests of the City of New York in the instant case are thus virtually identical to those of the petitioner. A resolution of the issues presented by this case will have a direct and immediate effect on the ability of the City of New York to continue to enforce its rule prohibiting the usurpation of our streets by those who install structures used to dispense commercial speech.

SUMMARY OF ARGUMENT

Commercial interests have no constitutionally protected right to appropriate the public sidewalks and streets by placing permanent or semi-permanent structures on them to promote their products

and services. Commercial speech is not entitled to the same degree of constitutional protection as noncommercial speech, and is subject to reasonable regulation that directly advances substantial state interests. As long as such regulation is in proportion to the interest served, it should be sustained even if it does not represent the least restrictive alternative available.

Municipalities have a substantial interest in the appearance of their streets and the safe and unimpeded flow of pedestrian movement. Since the metal boxes used to distribute commercial advertising are unsightly and interfere with pedestrian movement, it is entirely appropriate to ban them. Although the newsracks boxes used to distribute newspapers and other noncommercial speech also present esthetic and safety problems, the failure of a community to proscribe newsracks and boxes

containing such speech should not preclude it from banning structures used to dispense commercial speech. In this regard, the First Amendment does not oblige a municipality to accord commercial speech the same consideration it may accord noncommercial speech. A ban limited to structures used for the dissemination of commercial speech will nevertheless enhance the appearance of a community and improve the flow of pedestrian traffic. In light of the fact that a reasonable fit exists between the ends sought to be accomplished by the ordinance under review here and the means chosen to accomplish it, the ordinance should be upheld.

ARGUMENT

THE ORDINANCE IN QUESTION DIRECTLY ADVANCES IMPORTANT MUNICIPAL INTERESTS IN PEDESTRIAN SAFETY AND ESTHETICS, AND REPRESENTS A REASONABLE FIT BETWEEN THESE

INTERESTS AND THE MEANS CHOSEN TO PROTECT THEM. IN ADDRESSING THE PROBLEM POSED BY THE INSTALLATION OF NEWSRACKS AND OTHER BOXES, A MUNICIPALITY MAY, CONSISTENT WITH THE FIRST AMENDMENT, CHOOSE TO LIMIT ITS REGULATION TO BOXES USED TO DISTRIBUTE COMMERCIAL SPEECH.

(1)

Over the fifteen years since its decision in Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), this Court has repeatedly held that the First Amendment provides only limited protection for commercial speech. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 477 (1989); Shapero v. Kentucky Bar Assn, 486 U.S. 466, 472 (1988); Posadas De Puerto Rico Associates. v. Tourism Company of Puerto Rico, 478 U.S. 328, 340-341 (1986); Zauderer v. Office of

Disciplinary Counsel, 471 U.S. 626, 637 (1985); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-456 (1978). Commercial speech may be subject to regulation that directly advances substantial government interests. Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980). More recently, in Board of Trustees of the State University of New York v. Fox, supra, this Court held that the Central Hudson test does not require that government regulation be by the least restrictive means available, but requires only that such regulation be in reasonable proportion to the interest served. Id. at 479-480. For the reasons set forth below, we submit that the Cincinnati policy

meets the Central Hudson test as articulated in Fox.*

The analysis of the relevant commercial speech decisions of this Court by the Court of Appeals was incorrect. The opinion of the Court below was premised on its mistaken belief that commercial speech is entitled to the same level of protection as noncommercial speech unless it is false or misleading or "adverse effects on the community ... flow naturally from personal actions fostered by the commercial content of the speech itself." 946 F.2d 470-471. This Court has not extended such broad

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* In the Court below, respondents apparently conceded that their publications constitute commercial speech. 946 F.2d, 467, n. 4. This concession was appropriate in view of the finding by the District Court that neither publication contains noncommercial speech that is inextricably intertwined with the commercial speech. See Trustees of the State University of New York v. Fox, supra 492 U.S. 469 at 474-475.

protection to commercial speech. There has never been any doubt that commercial speech which is false or misleading or otherwise deleterious to the public welfare does not enjoy First Amendment protection. See Friedman v. Rogers, 440 U.S. 1 (1979); Pittsburg Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973). However, Virginia Pharmacy Board and its successor cases hold that even commercial speech that is benign or serves a useful purpose may be subject to greater government regulation than noncommercial speech. The holding of the Sixth Circuit would invite the very dilution or leveling of the force of the First Amendment's guarantee with respect to noncommercial speech that this Court recognized in Ohralik v. Ohio State Bar Assn., supra 436 U.S. 447, 456, should be avoided.

No commercial enterprise should have a right to appropriate for its own use a portion of the public sidewalk by installing a box to dispense advertising for its products or services. The sidewalks belong to the public and its right of free passage on them is not limited by any constitutionally protected right which would enable the respondents to engage in the activity at issue here. Cf. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 778-784 (1988) (White, J., dissenting).

The substantial interest of a municipality in the unencumbered flow of pedestrian and vehicular traffic and the appearance of its streets is beyond dispute and has been recognized by this Court on previous occasions. Members of City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805-807 (1984);

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-512 (1981). In Taxpayers for Vincent the esthetic interest was held sufficient to justify a ban on the posting of signs, including political campaign posters, on public property. Esthetics and traffic safety were held sufficient in Metromedia to warrant a content-neutral ban on outdoor advertising signs.*

The Cincinnati ordinance, like the ordinances sustained in Taxpayers for Vincent and Metromedia, advances these

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* The Sixth Circuit held that Metromedia would have controlled this case but for the fact that only "a plurality of the Court found that the San Diego ordinance constitutionally regulated commercial speech." 946 F.2d 470, n.9. That interpretation of Metromedia is incorrect. A majority of this Court in Metromedia recognized the right of a municipality to establish a content-neutral ban on outdoor advertising signs. 453 U.S. 490, 507-512 (plurality opinion); Id., at 541, 552-553 (Stevens, J., dissenting in part); Id. at 559-561 (Berger, C.J., dissenting); Id, at 570 (Rehnquist, J., dissenting).

important governmental concerns. Sidewalk boxes and newsracks are inherently unsightly and pose a substantial threat to the free flow of pedestrian traffic. The numbers of these structures that have appeared on the streets of our cities over the last five years has grown astronomically. Rows of weatherbeaten, rusting boxes and newsracks lined up along the sidewalks or chained in clusters around lightpoles are now a common sight. In New York City hundreds of boxes have been placed on the streets of Manhattan, in addition to the hundreds of newsracks placed on the sidewalks by newspapers and other noncommercial interests. The sidewalks of our cities are already crowded with numerous structures which singly or in combination are unsightly or obstructive, but which must be accommodated: trash cans, fire hydrants and alarm boxes, street signs, lampposts,

mailboxes and the like. There is not sufficient space to permit commercial interests to install boxes or other structures on the sidewalks, and a municipality in regulating the use of the streets must be mindful of the cumulative effect of these intrusions.

The presence of boxes used to dispense commercial advertising is a growing problem for the City of New York. The boxes found on our sidewalks are usually not well-maintained by their owners and are often dirty, rusting and bent. The boxes are frequently empty of advertising material and used by passersby as garbage receptacles. It is not uncommon for such boxes to be placed in cross-walks or to topple over, blocking pedestrian traffic. Many boxes have been abandoned by their owners and remain as eyesores long after their owners have ceased doing business.

The problems created by the presence of these boxes are not limited to Cincinnati and the City of New York. See Chicago Observer, Inc. v. City of Chicago, 929 F.2d 325 (7th Cir., 1991). In Chicago Observer the Seventh Circuit upheld a Chicago ordinance that prohibited, inter alia, off-premises advertising attached to newsracks. The Court noted the large numbers of boxes and newsracks on the streets, and also observed that the plaintiff's boxes "contain used chewing gum and other debris more often than they contain newspapers." Id. at 326. It concluded that the City's interest in esthetics and safety justified the restriction on advertising.

In light of the fact that the boxes are inherently unsightly and pose hazards for pedestrians, it is entirely appropriate to ban them. See Metromedia, Inc. v. City of

San Diego, supra 453 U.S. 508. This Court observed in Board of Trustees of the State University of New York v. Fox, supra that the Metromedia opinion "did not inquire whether any less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics." 492 U.S. 479. (Emphasis the Court's.) In upholding the prohibition against the posting of signs on public property at issue in Taxpayers for Vincent, the majority noted that the visual blight caused by the placement of signs was "not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. 810. The Court also contrasted the posting of signs with the distribution of leaflets and handbills, noting that the latter conduct continued while the speaker or distributor remained on the scene but that

posted signs remain unattended until removed. Id. at 809.

The reasoning of the Court in Taxpayers for Vincent applies with equal force in the instant case. Like the posted signs at issue in that case, the boxes that are the medium of expression here are obviously the cause of the visual blight, and are intended to remain on the sidewalks indefinitely.

In addition to dispensing commercial advertising, advertising for the products or services is found on the boxes. In the final analysis, these boxes are nothing more than miniature billboards which have been placed on the streets to promote private commercial interests.

The Cincinnati ordinance is not invalid because it does not extend to newsracks or other boxes used for the dissemination of noncommercial speech. See

Metromedia, Inc. v. City of San Diego, supra at 453 U.S. 510-512 (ban on offsite advertising not invalid because ban did not extend to onsite advertising); Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, supra 466 U.S. 789. Taxpayers for Vincent categorically rejected the argument that a prohibition against the use of unattractive signs cannot be justified on esthetic grounds if it fails to apply to all equally unattractive signs wherever located. Id. at 810. A municipality may determine, the opinion stated, that its interest in esthetics is outweighed by a countervailing interest that justifies the continued use of some signs. "Even if some visual blight remains," the Court stated, "a partial, content-neutral ban may nevertheless enhance the City's appearance." Id. at 811.

The First Amendment does not require that Cincinnati accord commercial speech parity of treatment with noncommercial speech. In view of the fact that commercial speech occupies a subordinate position in the scale of First Amendment values, a municipality may allow noncommercial interests to engage in activities not permitted commercial enterprises as long as the limitation on commercial speech advances important government interests in a reasonable manner.

Like Cincinnati, the City of New York has not chosen to ban boxes containing noncommercial speech. Increased accessibility to the daily press and other noncommercial publications can be viewed as serving the public interest. This consideration, which in the view of the City of New York tipped the balance in favor of permitting the newspapers and other

periodicals to place newsracks on our sidewalks, is not present in the case of commercial advertising.*

Although all newsracks and boxes on the sidewalks are unsightly and present hazards to pedestrians, boxes used by commercial interests are particularly offensive. The vast majority of boxes used by newspapers and other noncommercial interests are coin-operated and cannot, therefore, be opened without payment of money. In contrast, boxes used to distribute advertising are not coin-operated but are either open faced or covered with a

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* This Court has left open the question whether a municipality may ban entirely the placement of newspaper vending machines and newsracks on its streets. City of Lakewood v. Plain Dealer Publishing Co., supra, 486 U.S. 750, 762, n. 7 (1988). This case does not raise that issue, and the City of New York has no plans to ban newsracks dispensing noncommercial speech.

lid that may be freely opened. Consequently, as we described earlier, it has been our experience that boxes used to dispense advertising are often used as garbage receptacles by passersby. Since they are not coin-operated, the conversion of these boxes into waste receptacles is unavoidable. Rusting, filthy boxes purportedly placed on the streets to dispense advertising but unattended and overflowing with refuse are now a common sight on our streets.

As previously noted in our discussion, the New York Court of Appeals held that the First Amendment rights of commercial interests are not violated by a rule that permits noncommercial speech to be distributed by sidewalk boxes but prohibits commercial speech from being distributed in the same manner. City of New York v.

American School Publications, Inc., supra, 69 N.Y.2d 583, 509 N.E.2d 314.

The ordinance under review here meets the "reasonable fit" test established by this Court in Fox because the means chosen by Cincinnati to address the problems posed by these structures is in reasonable proportion to the societal interests served by the ordinance. The policy established by Cincinnati is no more expansive than necessary to serve it substantial interests. See, e.g., Fox, supra at 476; Central Hudson, supra at 566. No attempt is made to ban the distribution of respondents commercial speech in that community or to censor or control its content. The ordinance does not prevent the respondents from disseminating their advertising by other means. The record of this case indicates that respondent Discovery Network distributes only 33% of its advertising

publications by means of sidewalk boxes and that Harmon Publishing Company circulates only 15% of its real estate listings by such means. 946 F.2d at 471. Most copies of respondents' advertising publications reach the public by means of direct mailing, bookstores, supermarkets, eating establishments and the like. Thus, there exist ample alternative means by which respondents can reach potential customers.

This Court has recognized that commercial speech is less likely than noncommercial speech to be inhibited by lawful regulation. Friedman v. Rogers, supra 440 U.S., 1, 10; Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977). The record here indicates that this case is no exception to the rule, and that commercial advertising will continue to flourish, notwithstanding the limited restriction placed on it by the municipality.

The Court below reasoned that since respondents owned only 62 of between 1,500 to 2,000 newsracks and boxes on the Cincinnati sidewalks, the benefit gained by their removal would be "minuscule". 946 F.2d 471. The Sixth Circuit observed that Cincinnati had available to it a variety of alternatives that would meet its concerns, including requiring boxes and newsracks to be bolted to the streets rather than chained to lightpoles, promulgating color and design limitations, or establishing a maximum number of newsracks and boxes that may be placed on the sidewalks. Id. at 472.

The reasoning of the Court of Appeals ignores both the holding in Fox that a community need not select the least restrictive means of regulating commercial speech and the Court's admonition in that case that the judicial branch should "provide the Legislative and Executive Branches

needed leeway in a field (commercial speech) 'traditionally subject to government regulation.' " 492 U.S. 481. Fox recognizes that government officials should be vested with discretion to devise reasonable and balanced solutions to problems that may be posed by commercial speech.

If the citizens of Cincinnati acting through their elected officials believe that pedestrian safety and the appearance of the streets is enhanced by this partial, content-neutral limitation on street boxes, the federal courts should defer to that judgment. The Court of Appeals inappropriately substituted its views of what is best for the community for those of its elected officials. The list of alternative solutions proposed by the Court of Appeals represents precisely the sort of judicial

second-guessing that was rejected by this Court in Fox.

CONCLUSION

THIS COURT SHOULD HOLD THAT THE FIRST AMENDMENT DOES NOT PROHIBIT A MUNICIPALITY FROM BANNING THE INSTALLATION ON THE SIDEWALKS OF BOXES USED TO DISPENSE COMMERCIAL SPEECH, AND THAT THE PARTIAL, CONTENT-NEUTRAL POLICY ESTABLISHED BY CINCINNATI IS IN REASONABLE PROPORTION TO THE INTEREST SERVED BY IT.

Respectfully submitted,

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